

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ALI BOSTON

Appellant

No. 549 EDA 2012

Appeal from the PCRA Order of January 13, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No: CP-23-CR-0005657-2005

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.:

FILED AUGUST 14, 2013

Ali Boston ("Appellant") appeals from the January 13, 2012 order, which dismissed his petition for relief filed under the Post-Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S. §§ 9541-46. For the reasons set forth below, we adopt a substantial majority of the PCRA court's well-reasoned opinion and affirm.

At approximately 1 a.m. on February 18, 2001, Appellant was inside Dixon's Lounge in Darby Township, Pennsylvania, when a fight erupted. Eventually, many of the patrons, including Appellant, exited the bar. While outside, Appellant brandished a firearm and shot and killed Shawn Russell and wounded Ricardo Johnson and Charles Ross. **See** PCRA Court Opinion

* Retired Senior Judge assigned to the Superior Court.

("P.C.O."), 8/27/2012, at 3. Based upon these events, Appellant was charged in multiple informations with first-degree murder, third-degree murder, two counts of aggravated assault—attempted serious bodily injury, carrying a concealed weapon without a license, voluntary manslaughter, and two counts of aggravated assault—causing bodily injury with a deadly weapon.¹

Appellant's first trial resulted in a hung jury. Before his second trial commenced, the Commonwealth extended a plea offer to Appellant, which would have required Appellant to plead guilty to third-degree murder in exchange for a six- to twenty-year prison term. Appellant was represented by Attorney Tariq Karim El-Shabazz, Esquire ("Attorney El-Shabazz"). After consultation with Attorney El-Shabazz, Appellant rejected the plea offer. Following a second trial, Appellant was convicted of third-degree murder, carrying a concealed firearm without a license, and four counts of aggravated assault, for which Appellant received an aggregate sentence of twenty-five and one-half to fifty-one years in prison. We affirmed the judgment of sentence on direct appeal. ***See Commonwealth v. Boston***, 2303 EDA 2007 (Pa. Super. May 13, 2009) (unpublished memorandum). The Pennsylvania Supreme Court denied Appellant's petition for allowance of

¹ 18 Pa.C.S. §§ 2502(a), 2502(c), 2702(a)(1), 6106, 2503, and 2702(a)(4), respectively.

appeal on November 24, 2009. **See Commonwealth v. Boston**, 983 A.2d 1246 (Pa. 2009).

On October 4, 2010, Appellant filed a timely PCRA petition. On May 12-13, 2011, the PCRA court held a hearing. On January 13, 2012, following the hearing and extensive briefing by the parties, the PCRA court denied Appellant's petition. On February 10, 2012, Appellant filed a notice of appeal. The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), because the court believed that the record was sufficiently clear and developed to identify the issues that Appellant advanced. On August 27, 2012, the PCRA court issued an exhaustive opinion pursuant to Pa.R.A.P. 1925(a).

Appellant raises three issues for our consideration:

1. Whether the PCRA court erred when it ruled that a criminal defense attorney's performance is not objectively deficient when he fails to (A) give his client the benefit of reasonable professional advice in connection with a very favorable plea offer; (B) recommend that the client accept a very favorable plea offer; [and/or] (C) inform the client of the strengths and weaknesses of the state's case and the probable outcome of a trial?
2. Whether the PCRA court erred when it failed to conduct a probing inquiry for prejudice and when it did not consider as objective evidence of the prejudice component of **Strickland** the enormous difference between the sentence imposed and the sentence that would have been imposed had the client accepted the plea offer, the willingness to plead evidenced by the Appellant's counteroffer, and the willingness to consistently follow counsel's advice?
3. Whether the PCRA court erred when it ruled that trial counsel's performance was not objectively deficient and did not cause prejudice when counsel failed to (A) request an

instruction informing the jury that the testimony of informant Kendall Smith should be received with great care and caution as a result of the benefits he received in exchange for his testimony against Appellant; (B) object to implied accusations as violations of the confrontation clause of the Sixth Amendment; and (C) object to the prosecution's improper closing argument?

Brief for Appellant at 2 (emphasis in original).

Our standard of review for PCRA court orders is well-settled:

This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa. Super. 2007) (citation modified).

We have reviewed the arguments presented in the briefs, the relevant law, the certified record on appeal, and the PCRA court's August 27, 2012 opinion. The PCRA court has authored a fifty-six page opinion, which is attached to this memorandum for reference, wherein the court, in exacting detail, sets forth the factual and procedural history of the case, a summary of the testimony elicited at the PCRA hearing, the court's credibility determinations, the history of the plea offers, and the applicable legal standards. The PCRA court provides a cogent and, in large part, accurate legal analysis demonstrating that Appellant is not entitled to PCRA relief.

With the exception of the following two points, we adopt the PCRA court's opinion.

First, the PCRA court noted that it did not have the benefit of the United States Supreme Court's decisions in ***Lafler v. Cooper***, 132 S.Ct. 1376 (2012), and ***Missouri v. Frye***, 132 S.Ct. 1399 (2012), prior to entering its dismissal order. In these companion cases, the Supreme Court extended the Sixth Amendment right to effective assistance of counsel to the plea bargaining process and held that, as a general rule, defense counsel has the duty to communicate formal plea offers from the prosecution that may be favorable to the accused. ***Frye***, 132 S.Ct. at 1408. However, counsel's dereliction of this duty does not alleviate a defendant's burden to demonstrate prejudice. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." ***Id.*** at 1409; ***Lafler***, 132 S.Ct. at 1384. Defendants also must demonstrate "a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." ***Frye***, 132 S.Ct. at 1409.

Here, unlike in ***Frye*** where the defense attorney failed entirely to communicate the offer to the defendant, the PCRA court credited Attorney El-Shabazz's testimony that he communicated the offer to Appellant and spent a considerable amount of time explaining the pros and cons of the

offer to Appellant. Hence, we agree with the PCRA court's ultimate determination that Appellant was not provided deficient representation by Attorney El-Shabazz, and that Appellant's rejection of the plea offer was not based upon Attorney El-Shabazz's advice, or lack thereof, but upon Appellant's belief that a critical prosecution witness was not going to appear at trial. **See** P.C.O. at 43-45. Additionally, we agree with the PCRA court that, even if Attorney El-Shabazz's performance was defective, Appellant could not demonstrate the requisite prejudice to be entitled to relief. **Id.**

In **Frye**, the Supreme Court held that a defense counselor's failure to communicate a formal plea offer to a defendant constitutes ineffective assistance of counsel. 132 S.Ct. at 1410-11. Here, because Attorney El-Shabazz communicated the offer to Appellant, **Frye** is inapplicable. **Lafler** addressed the relevant prejudice analysis that courts must conduct once plea counsel has been deemed to be ineffective. **Lafler**, 132 S.Ct. at 1382-83. Because Attorney El-Shabazz was not ineffective, **Lafler** also has no bearing on this case. Thus, even if the PCRA court had the benefit of these two decisions prior to rendering its decision, the outcome would not have been different.

Second, in addressing Appellant's claim that trial counsel was ineffective for failing to request a non-standard jury instruction regarding informant testimony, the PCRA court held that Appellant failed to prove that the instruction was warranted because Appellant failed to produce expert testimony to demonstrate that the instruction was reasonable, based upon

then-existing standards of national or local practice. **See** P.C.O. at 47. The PCRA court further held that such expert testimony is “mandatory.” **Id.** at 48. The PCRA court cites no cases, from Pennsylvania courts or otherwise, to support this conclusion. We specifically disavow this holding. However, we need not address the issue further, because we agree with the trial court that Appellant did not suffer any prejudice due to the trial court’s refusal to issue the requested instruction. **Id.** at 48-50.

In all other respects, we adopt the PCRA court’s thorough, well-reasoned opinion.

Order affirmed.²

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written in black ink on a white background.

Prothonotary

Date: 8/14/2013

² The Commonwealth has filed a motion to strike Appellant’s reply brief, wherein the Commonwealth contends that Appellant utilized the reply brief procedure merely to repeat and re-emphasize the arguments raised in Appellant’s principal brief. While there is some overlap in the substance of Appellant’s principal brief and his reply brief, Appellant’s reply brief also points out perceived inconsistencies in the Commonwealth’s factual and legal arguments, and highlights facts that contradict the Commonwealth’s arguments. Thus, the Commonwealth’s motion to strike Appellant’s reply brief is denied.

